STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL MARTIN,

Plaintiff-Appellee,

v.

MILHAM MEADOWS I LIMITED PARTNERSHIP and MEDALLION MANAGEMENT, INC.

Defendants-Appellants.

SC No. 154360

COA No. 328240

Kalamazoo CC No. 13-000485-NO

ANSWER TO APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE REGARDING E-SERVICE

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STATEMENT OF QUESTIONS INVOLVED

Should this Court deny Defendant's request to grant review on the questions of (1) whether the stairs at issue were fit for the use intended by the parties, pursuant to MCL 554.139; (2) whether the stairs at issue were in reasonable repair, pursuant to MCL 554.139; and (3) whether the Defendant-Appellant had actual or constructive notice of the condition of the stairs, when the evidence establishes that Defendants-Appellants built the stairs, were told the stairs were dangerous, yet failed to do anything to remedy this condition?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

COUNTER STATEMENT OF FACTS

This case arises out of the extensive and permanent injuries suffered by Plaintiff-Appellee, Michael Martin, when he fell down a set of dangerously designed and poorly maintained stairs, leading to his basement, on October 15, 2010. At that time, Michael was a tenant in a unit at the Milham Meadows Apartments, 2424 Falcon Court, Kalamazoo, Michigan. The residences at Milham Meadows were managed and overseen by Medallion Management, Inc. (Milham Meadows and Medallion Meadows will hereafter be referred to collectively as, "Defendants"). Michael entered into a lease agreement with Milham Meadows on July 13, 2007 (Signed Lease Agreement, Exhibit 1).

Upon leasing the apartment, Michael installed a gym with boxing bags in his basement for his daily work out. (Michael Martin Dep., Exhibit 2, 21:7-18). Physical fitness was Michael's life and he was in great shape. Unfortunately, due to the design and condition of the steps, Michael slipped on the stairs several times going to his basement. Michael testified as follows:

> **A. I slipped one time and fell on my tailbone. And then I had a couple other slips; like one foot would slip but I was able to grab the rail and control it. It happened like three times.**

(Exhibit 2, 35:11-13).

Michael's son, Josh, also slipped on the top step on at least two occasions and considered them slippery and dangerous. (Josh Martin Affidavit, Exhibit 3). Josh was also aware that a workout partner, Tony, as well as his brother, Jesse, slipped on these same steps. (Exhibit 3). Michael learned from his neighbor, Phil Ricks, that he complained about the slippery steps after his daughter had also slipped in his unit. (Exhibit 2, 35:22-24; 40:12-25).

Because the stairs were slippery and dangerous, Michael notified the Defendants' maintenance man who lived a couple doors down. (Exhibit 2, 39:5-14). However, rather than do anything, the maintenance man simply told Michael to talk to the apartment management, or leave a note with them explaining that the steps were dangerously slippery. (Exhibit 2, 39:5-14). Michael did just that. He complained, in person, to the resident manager, Jamie Zwicker, but got no response. (Exhibit 2, 39:21-25; 40:1-3). Michael could not make repairs to the stairs on his own because his lease agreement prohibited tenants from making modifications without prior written consent from Milham Meadows. Exhibit 1, para. 12, provides:

> **12. Restrictions on Alterations. No alteration, addition, or improvements shall be made in or to the premises without the prior consent of Landlord in writing.**

Nevertheless, once put on notice of a danger, Milham Meadows was legally and contractually responsible for making the necessary modifications to the premises so that they were made safe.[1] Maintenance worker, Tom Papesh, testified that Defendants were responsible for repairing the steps if they were slippery. (Tom Papesh Dep., Exhibit 4, 19:5-11) If they were hazardous, an employee should have checked them out to see what was causing people to slip and fall. Medallion Management, Inc. CEO, Scott Beltz, testified that, **he would hope the staff would at least check into the situation to see if there was something that caused the tenant to slip.** (Scott Beltz Dep., Exhibit 5, 53:12-24). The subject lease also required Milham Meadows to **"make reasonable accommodation to an otherwise eligible tenant's disability, including...making and paying for structural alterations to a unit..."** (Exhibit 1, para. 12).

[1] Specifically, the leased provided:

10. Maintenance.

a. The Landlord agrees to:

(5) make necessary repairs with reasonable promptness;…

(Exhibit 1)

Finding that his face-to-face complaints were falling on deaf ears, Michael asked for help in writing. On September 14, 2009, Michael submitted the following letter to the management office:

> **I wanted to let you know that I slipped on the last couple of steps in the basement. I didn't get hurt but they are slippery. Can you put down some strips or something on the steps? My blinds in the living room still keep falling down I think the clips are broken. Can you put in new clips?**

(Exhibit 6).

Michael delivered the letter to the management office and put it in the slot in the door where he would also put his rent and other work requests. (Exhibit 2, 38:11-25). Michael testified that ***all*** the steps were problematic. (Exhibit 2, 38: 2-10). In response to his letter, Michael received no call or inquiry from anyone at Milham Meadows or Medallion Management, Inc. (Exhibit 2, 39:1-4). Nothing was ever done to put down inexpensive traction strips on the treads, nor did anyone even come to inspect the stairs, as he had requested. Then, tragedy occurred.

On October 14, 2010, Michael was in his living room, warming up for another session of working out. (Exhibit 2, 45:8-17). He was wearing runner's tights, a regular shirt, and his Nike cross-trainer shoes. (Exhibit 2, 45:18-21; 48:21-22). He had not had any alcohol to drink that day. (Exhibit 2, 70:2-3; 80:7-9). ***Michael does not drink alcohol before training.*** (Exhibit 2, 80:7-9). After warming up, Michael proceeded toward the door to his basement. All of his workout gear was already downstairs so he did not have anything in his arms. (Exhibit 2, 46:17-20). Michael opened the door to the basement and stepped forward. After that, he remembers slipping on the first step and then everything going blank. (Exhibit 2, 46:21-25; 47:9-20).

The next thing Michael recalls is waking up at the bottom of the steps and not being able to move his arms or legs. (Exhibit 2, 51:11-20). He began screaming for help, but no one was able to hear him until the next day. Michael was told by his wife, April, that he was in the basement for 16 hours. (Exhibit 2, 51:11-20). Eventually, his neighbor heard him and got a maintenance man, Tom Papesh, to open the door. Soon after, the paramedics arrived. Michael has no recollection of talking to anyone due to being in shock. (Exhibit 2, 55:12-19; 57:4-6). He was later diagnosed with **a brain injury, neck fractures and is now partially paralyzed.** (Mary Free Bed Report, Exhibit 7).

One of the first responders was a paramedic in training, Alexander Moldovan. Mr. Moldovan testified that Michael told him that he "slipped and fell." (Alexander Moldovan Dep., Exhibit 8, 18:1-4). He also testified that **no** alcohol was smelled on Michael's breath. (Exhibit 8, 35:9-10). Mr. Moldovan opined that the stairs to the basement were "**more narrow than they should have been**." (Exhibit 8, 39: 5-7). He was wearing boots with deep tread that provided good friction so he was able to use the stairs without slipping. (Exhibit 8, 39:8-23). Mr. Moldovan did not see any mats or broken bottles or glasses at the bottom of the stairs, or anything else to suggest that Mike had been carrying anything or drinking. (Exhibit 8, 16:10-15).

i. <u>The hazardous stairs</u>

In Interrogatory answers, Defendants have averred that they have no knowledge as to if/when the stairs were painted after the building was originally constructed in 1972, or what type of paint was used:

> Interrogatory Answer #35: **The specific type of paint that was on the stairs at the time of Plaintiff's incident is not specifically known. Upon information and belief, however, the paint is likely a Sherwin-Williams product marketed for use on stair treads.**

> Interrogatory Answer #36: **Upon information and belief, the stairs were originally painted by VanderVeen Construction and likely repainted by Defendant in 1995. Moreover, as a practice, basement stair treads are painted as needed– typically immediately prior to a unit being leases.** ***It is not clear whether the subject stairs were repainted at any point apart from original construction or in 1995 during a comprehensive rehabilitation of the property.***

(Interrogatory Answers, Exhibit 9) (Emphasis added)

A non-party Request for Production was sent to Again Painting, LLC, which responded with an invoice showing that the ***only*** time the steps were ever painted was on February 17, 2011, several months ***after*** the date of the incident. (Exhibit 10). Defendants have provided no record to establish what kind of paint was used on the steps.

Professional engineer, Patrick Glon, prepared a report outlining several of the dangers posed by the steps in Michael's apartment. (Glon Report, Exhibit 11). Mr. Glon has opined that the steps were already slippery due to the paint covering them that does not contain sand or some other "non-slip" additive. Adding to the danger of the steps is that they are no longer compliant with the current building codes, which are established to allow for minimum levels of safety. Specifically, the BOCA code requires that the **minimum** tread depth of steps be 11 inches and the maximum riser height of each step is 7 inches. (Exhibit 11). The top step in Michael's townhouse is under 9 inches in depth, and the riser is almost 9 inches! (Stair Photographs, Exhibit 12).

Thus, the steps are dangerously steep and narrow, and their depth does not allow for adequate foot coverage when a tenant is descending them. In addition, the nosing of the tread is worn excessively, rounded and chipped, adding to the slipperiness and shortening of an already short tread. Mr. Glon also reports that "the uniform color of the steps of the staircase makes it hard to distinguish individual treads when looking down from the top. This, in turn, makes an

overstep more likely and, therefore, the steps become more dangerous." (Exhibit 11). The different steps also vary in riser height, which distorts a stair user's ability to safely descend them. Finally, the handrail is only 31 ½ inches in height, well below the 34 inches to 38 inches required by building codes. Based on the foregoing, Mr. Glon concluded that **"the top step of the basement staircase of the rental townhouse is unsafe and dangerous, and presents a significant risk of a slip and fall."** (Exhibit 11). Further, "anti-skid adhesive tape, a very simple and inexpensive remedy, added to the nosings of the treads would provide a visual contrast to the tread nosings as well as making the nosings slip resistant." (Exhibit 11).

ii. Defendants' expert

On July 1, 2014, Defendants retained John Leffler, PE, to use a tribometer machine in an attempt to test the slip resistance of the stairs at issue. However, the surface of the stairs had been completely altered when the stairs were painted over in February 2011. Thus, by wrongfully destroying this evidence, there was no way to get an accurate determination of the paint characteristics used on the stairs.[2] Mr. Leffler conceded that, because of the significant passage of time, and the surface of the stairs being altered, he had no knowledge of the condition of the surface on the date of incident and, thus, was not in a position to provide traction measurements that would have existed at the time of the incident. (John Leffler Dep., Exhibit 14, pages 35-37).

[2] Defendants utilized their own spoliation of evidence to their advantage in the trial court by arguing that Mr. Leffler's report confirmed that the paint used on the steps made them safe, fit for their intended use, and in reasonable repair. (Exhibit 13, Court of Appeals opinion, pg. 3)

COUNTER STATEMENT OF MATERIAL PROCEEDINGS

A Complaint was filed against Defendants on October 14, 2013, alleging premises liability, ordinary negligence, and violations of MCL 554.139. Based on the Michigan Court Rules requiring general pleadings, the basis of the allegation was that Defendants failed to ensure the premises were fit for the use intended by the parties and in reasonable repair. (Exhibit 15, Plaintiff's Complaint). Defendants answered the complaint generally denying all allegations and asserting affirmative defenses.

On October 31, 2014, Defendants filed a Motion for Summary Disposition, seeking dismissal of all counts in Plaintiff's Complaint. Defendants then successfully moved the Court to push back the case management deadlines for a second time, allowing the Motion for Summary Disposition to go unheard until March 16, 2015. Prior to that date, Plaintiff filed a response to Defendants' Motion, as well as a Motion to Exclude Mr. Leffler's expert opinions. Plaintiff argued that Mr. Leffler's opinions should be excluded for lack of foundation because the surface of the stairs was significantly different when he tested them than it was at the time of the incident. Further, Mr. Leffler's machine only tested traction measurements in one small area of the steps, failing to provide a measurement for where Plaintiff may have actually stepped before he fell.

At the March 16, 2015, hearing, Circuit Court Judge Alexander Lipsey did not rule on Plaintiff's Motion to Exclude Mr. Leffler's opinions. Instead, Judge Lipsey granted Defendants' Motion for Summary Disposition, dismissing the entire case. After Plaintiff's Motion for Reconsideration and Motion to Amend Complaint were denied, an appeal followed, which was heard on June 7, 2016. On July 19, 2016, the Court of Appeals issued an opinion reversing the trial court's summary dismissal of the Plaintiff's statutory claims and remanded for continued

proceedings. (Exhibit 13). In its opinion, the Court of Appeals found that, because Plaintiff had notified Defendants on numerous occasions of the slippery and dangerous stairs, and Defendants failed to do any investigation that would have revealed the condition of the steps, there remained material questions of fact as to the Defendants' actual and constructive notice of the hazard. Specifically, Plaintiff had communicated his concerns to the apartment staff on several occasions, and the note he wrote to management indicated that "they"—the stairs in general—were slippery. (Exhibit 13, page 8). In examining the Defendants' statutory violations, the Court of Appeals discussed the standard set forth in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419; 751 NW2d 8 (2008), finding that reasonable minds could differ as to whether a slippery indoor stairway was fit for the use intended by the parties. Likewise, there remained material questions of fact as to whether Defendants kept the premises in reasonable repair after being put on notice that the stairs were slippery. Finally, the Court of Appeals determined that Plaintiff is free to amend his Complaint to add allegations related to additional defects in the stairs related to their geometry and building code violations.

Defendants' application for leave to appeal followed.

SUPREME COURT REVIEW IS NOT JUSTIFIED IN THIS CASE

The granting of leave to appeal is left to the sound discretion of the appellate court. Pursuant to MCR 7.305(B), the application must show one or more of the factors justifying Supreme Court review. Defendants assert two reasons why their application should be granted: (1) this case's issue involves a legal principle of major significance to the state's jurisprudence (subsection [3]) and (2) that the Court of Appeals' decision is clearly erroneous, will cause material injustice or conflicts with a Supreme Court decision or another decision of the Court of Appeals (subsection [5][a] and [b]).

Defendants' application should be denied as the Court of Appeals' opinion is consistent with MCL 554.139(1)(a) and (b) and its most recent analysis by this Honorable Court in *Allison*, subsequently applied in both published and unpublished opinions by the Court of Appeals, most recently in *Hadden v. McDermitt Apartments, LLC*, 287 Mich. App. 124 (2010). Thus, the Court of Appeals' opinion is not clearly erroneous, will not cause material injustice and clearly does not conflict with a Supreme Court decision or another published decision of the Court of Appeals. Further, the issues in this case involve legal principles that have been consistently applied in both this Court as well as in the Court below.

Consistent with *Allison*, the Court of Appeals noted that the plain meaning of "reasonable repair" requires repair of a defect in the premises, which is defined as "a fault or shortcoming; an imperfection." The Court further noted that MCL 554.139(1)(a) requires a landlord to keep the premises "fit" for the use intended by the parties, and that "fit" is defined as "adapted or suited; appropriate."

The Court of Appeals properly noted that plaintiff had presented genuine issues of material fact that the stairs were not fit for the use intended by the parties. In support, the Court

of Appeals took into consideration the report of plaintiff's expert that the construction, design and paint used on the stairs made them dangerous, and thus not fit for their intended use. Thus, consistent with the Court of Appeals' subsequent decision in *Hadden*, the differences of opinion regarding whether the indoor stairway was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of plaintiff's fall was a factual dispute to be resolved by a jury, and not the Court.

In addition, the Court of Appeals properly found that there remained an issue of fact as to whether notice had been provided, taking into account the conflicting testimony. Again, this was an issue to be resolved by the jury, and not the Court.

Finally, the Court of Appeals' opinion is consistent with previous decisions by the Court of Appeals in cases like *Grubaugh v St. Johns*, 82 Mich App 282, 288; 266 NW2d 791 (1978), which have found that the lack of prior accidents involve generally unreliable and irrelevant, negative evidence. The Court of Appeals' following statement is consistent with this state's jurisprudence:

> Despite that Martin used the stairway regularly, Glon's report evinces that each time he did so, he risked a fall. Indoor stairs are not supposed to be slippery. While ice and snow are expected conditions in a parking lot during a Michigan winter, interior stairways are intended to provide safe and secure access from one level of a building to another. While the landlord is not an insurer of a stairway safety, a landlord is not immune from liability under MCL 554.139(1)(a) merely because a tenant has safely traversed an unreasonably slippery stairway on multiple occasions. A tenant descending slippery stairs wearing certain shoes or treading slowly and carefully may avoid slipping. But standing alone, a tenant's ability to avoid an unfit condition does not render the premises fit for their intended use. Similarly, a question of material fact exists regarding whether defendants failed to keep the premises in reasonable repair after Martin [sic] provided notice of the step's slippery condition.

Accordingly, as the Court of Appeals' opinion is consistent with prior decisions of this

Honorable Court, as well as published decisions of the Court of Appeals, and is in line with this state's jurisprudence, Supreme Court review is unnecessary and unwarranted.

ARGUMENT

THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S SUMMARY DISMISSAL BECAUSE THERE REMAIN MATERIAL QUESTIONS OF FACT RELATING TO WHETHER: (1) THE STAIRS WERE FIT FOR THE USE INTENDED BY THE PARTIES; (2) THE STAIRS WERE IN REASONABLE REPAIR; AND (3) DEFENDANTS' ACTUAL AND/OR CONSTRUCTIVE NOTICE OF THE HAZARD

A. Standard of Review

The trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation,* 456 Mich. 331, 337; 572 N.W.2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted only if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich. App. 45, 48; 536 N.W.2d 834 (1995).

B. Law and Analysis

MCL 554.139(1) provides:

> (1) In every lease or license of residential premises, the licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, to comply with the applicable health and safety

> laws of the state and that the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.
>
> * * *
>
> (3) ***The provisions of this section shall be liberally construed...***

(Emphasis added).

Notably, the statute is required to be construed ***"liberally."***

The Michigan Supreme Court, in *Allison v. AEW Capital Management, LLP*, 481 Mich. 419 (2008), established that, under MCL 554.139, a landlord must keep its "premises" both fit for the use intended by the parties *and* in reasonable repair. Michigan Courts have also made clear that the "open and obvious" defense does not apply to any analysis under this statute. *Woodbury v Bruckner*, 467 Mich. 922; 658 NW2d 482 (2002); *O'Donnell v Garasic*, 259 Mich. App 569, 581; 676 NW2d 213 (2003). *Allison* defined "premises" as all parts of the apartment complex, excluding "common areas." *Allison, supra* at 431-432. In this case, the subject stairs are located inside the townhouse Mr. Martin was renting from Milham Meadows. Clearly, this was part of the "premises" and not a "common area." Thus, the Defendants had duties to keep the stairs both in reasonable repair and fit for the use intended by the parties.

While the *Allison* case provided the framework for evaluating allegations against a landlord for violating MCL 554.139, it also provided insight into the application of the statute to certain cases with differing factual scenarios. The *Allison* decision made clear that it was dealing with an outdoor parking lot, which served a primary purpose of parking vehicles, as opposed to walking across. Accordingly, the one to two inches of snow on the parking lot was not a violation of the landlord's statutory duties because it did not sufficiently impede the ability of

tenants **to park their cars**. Thus, the degree of care a landlord is required to take in creating a safe space for his tenants varies depending on where the area is located (indoor vs. outdoor), the area's intended use and, to a certain degree, the potential for serious harm that could result from any defect allowed to remain. While one to two inches of snow may be acceptable in a parking lot, it is *not* acceptable on stairs, even when the stairs are outdoors. *See Hadden v. McDermitt Apartments, LLC*, 287 Mich. App. 124 (2010).

Stairs, in general, serve a primary purpose of providing safe access between levels of a building. *Hadden* at 130. Defects, even small ones, in stairs, have a much greater potential to cause severe harm to tenants than level walking areas due to the considerable distance a tenant can fall. If stairs are slippery *at all*, or dangerously designed, safe access between building levels is seriously impeded. While the case may be made that outdoor stairs are sometimes expected to be slippery because they are exposed to the elements, the Court of Appeals in this case rightfully opined that, "indoor stairs are not supposed to be slippery." (Exhibit 13, pg. 10). Accordingly, in order to be fit for their intended use, indoor stairs must be kept slip-free at all times to comply with the expectations of those using the stairs. ***If a tenant or his guests are repeatedly slipping on a set of indoor stairs, as was occurring in this case, those stairs cannot be deemed to be fit for the use intended by the tenant when contracting with the landlord***.

Defendants argue that the proper standard to follow in Michigan is that a stairway is only unfit when it "precluded the ability to use the stairway to access different levels of the building…[and it] is not rendered unfit for its purpose simply because of a presence of some condition that requires a careful navigation of the steps." (App for Leave to Appeal, pg 16). This extreme interpretation of Michigan law is both dangerous and completely inaccurate. Under Defendants' logic, stairs would ***always*** be fit for the use intended by the parties, so long as it

were ***possible*** for a tenant to go up and down without slipping or getting hurt, regardless of the efforts necessary to do so. Under this interpretation, it is difficult to imagine *any* scenario where stairs would be deemed unfit, because it is always theoretically "possible" for a tenant to conceivably take greater efforts to avoid injury.

If adopted, Defendants' generic theory would, of course, create a host of absurd results unintended by the legislature. One extreme example would be if a landlord placed blue marbles all over a set of stairs. A tenant would technically still be able to access different levels of the building by walking carefully to avoid the marbles, while also holding to the railing. The tenant may even be able to employ such extreme efforts for years to successfully navigate the stairs. However, if the tenant did fall on a marble, under defendants' application of *Allison*, the stairs would still be fit for the use intended by the parties simply because the tenant had navigated the stairs successfully for years. This case involves an even greater danger than marbles on stairs because, similar to black ice, the hazards presented by the stairs at issue were not nearly as apparent. Defendants' argument also fails to consider the multitude of well-reasoned cases on this issue, including *Hadden*, where a statutory violation was found ***regardless*** of the fact that the plaintiff had previously navigated the dangerous area successfully.

Taken at face value, Defendants' theory would encourage landlords to shirk the duties imposed by the Michigan legislature in almost all instances, safe in the knowledge that no liability could possibly attach because the tenant had previously been able to navigate the stairs without injuring himself. In this world, a tenant could file complaints with his landlord to his heart's content, with no recourse, unless and until he injured himself--***twice***. This could not have been the legislature's intent when enacting a statute specifically designed to provide greater

safety to tenants, and a recourse for when the statute is violated. The Court of Appeals was correct in rejecting Defendants' arguments on this point by stating:

> **"By standing alone, a tenant's ability to avoid an unfit condition does not render the premises fit for their intended use."**

Exhibit 13, pg. 10

Ultimately, what is considered "reasonable" in terms of available access between levels of a building, should be left to the jury.

C. Argument

i. The Court of Appeals properly determined that there remain material questions of fact as to the determination of whether the stairs at issue were fit for the use intended by the parties, pursuant to MCL 554.139(1)(a).

In evaluating the merits of this case, the Court of Appeals properly reviewed and applied the framework set up in *Allison,* as well as *Hadden.* In interpreting MCL 554.139, the *Hadden* case found that, "the primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or structure." Thus, if a pedestrian cannot safely use the steps at all times, then this purpose is impeded. In *Hadden*, the Plaintiff notified her landlord on the day before her injury that the outdoor stairs she used to access her mailbox were covered with snow. *Hadden,* at 130-131. Despite the snow, the Plaintiff managed to successfully use the stairs. The next day, however, the Plaintiff again encountered the snow-covered stairs. As she proceeded to go down the steps on this occasion, she slipped and fell. The *Hadden* Court found that the *primary* purpose of stairs is to provide access for tenants between levels in their building. In *Hadden,* the Court determined that, even though the stairs were outdoors where snow was

expected, and the tenant had previously navigated the icy stairs successfully, there could be reasonable differences of opinion regarding whether the stairway was fit for its intended use.

In *O'Donnell v. Garasic*, 259 Mich. App. 569 (Mich. Ct. App. 2003), the Michigan Court of Appeals decided a case similar to this one. In *O'Donnell*, the Plaintiff was injured when she fell down the stairs at the Defendant's cabin when she tried to traverse them in the dark. Although the Court did not address the statutory violations because they had not been raised in the lower court, there were numerous building code violations that the Court found made the stairs unsafe and likely to cause severe harm. Accordingly, because the dangerous design and construction of the stairs made them "unreasonably dangerous," a logical conclusion would be that they also were unfit for the use intended by the parties.

Similarly, in this case, there are ***numerous*** aspects, including but not limited to, building code violations that made the stairway in Plaintiff's townhouse dangerous and unfit for their primary purpose of safely providing access between levels of the building. Patrick Glon, an engineer and expert on building codes and stairway designs, has concluded that, relative to the stairs in this case:

> ***"the top step of the basement staircase of the rental townhouse is unsafe and dangerous, and presents a significant risk of a slip and fall."***

(See Exhibit 11).

In reaching this conclusion, Mr. Glon identified numerous defects that made the subject stairs (specifically the top stair where Michael slipped) unfit for use by tenants:

1. **The top riser of the basement staircase in the rental townhouse is taller than those of safe staircases;**

2. **The top tread of the basement staircase in the rental townhouse is shorter than those of safe staircases;**
3. **The nosing of the top tread of the basement staircase in the rental townhouse is excessively rounded and chipped causing an already short tread to perform as an even shorted tread than those of safe staircases;**
4. **The uniform color of the steps of the staircase makes it hard to distinguish individual treads when looking from the top....Tread nosings -or at least the leading edges of treads-should be marked in some way to make them clearly visible to users;**
5. **The paint used on the staircase of the rental townhouse is normal paint that does not contain any "slip-resistant" additives;**
6. **The riser heights between steps is inconsistent and irregular;**
7. **The handrail in the staircase is lower than the building code required minimum; and**
8. **The headroom clearance at the bottom of the steps is less than required for safe staircases.**

All of these defects and building code violations ***combined*** were the cause of Plaintiff's injury. Obviously, slippery stairs are dangerous in and of themselves, but the potential for slipping or misstepping was aggravated in this case by the fact that the treads of the stairs were incredibly short, preventing Plaintiff's foot from being securely placed as he descended the steps. Likewise, the riser height was much higher than was permitted under Michigan codes, which increased the distance between treads and made a misstep more likely. The edges of the treads were also undiscernible and completely worn and rounded, increasing the likelihood of a slip event. Unless a tenant was always walking with the utmost care on the stairs (given the very nature of the day-to-day activities inside a home, this is something no person is always required or expected to do in the confines of their own home), then it was only a matter of time before a slip would occur.

Defendants are attempting to obfuscate the issues and avert the attention away from their negligence by claiming the stairs were safe because of the alleged number of times Plaintiff did *not* slip or injure himself when using them. This argument obviously ignores the actual facts of this case, which show Plaintiff and others *did* slip on the stairs on multiple occasions and reported several of the instances to Defendants prior to this incident. It also fails to consider the position Michigan Courts have taken on this argument. Specifically, Courts have found that "negative evidence" is not admissible because it is not probative on the issue of Defendants' negligence. In *Larned v Vanderlinde*, 165 Mich 464 (1911), the Supreme Court of Michigan, in a unanimous opinion, ruled that evidence of the absence of accidents was not admissible to show that a party was not negligent. A later case, *McAuliff v Gabriel*, 34 Mich App 344 (1971), further buttressed this holding by stating, "Admittedly, the policy of this state, as expressed in a considerable body of case law, has evolved limitations on the reception of so-called 'negative evidence'. Testimony showing the absence of prior accidents is not competent evidence on the issue of defendants' alleged lack of negligence." *Id*. at 349. See also, *Grubaugh v St. Johns*, 82 Mich App 282, 288; 266 NW2d 791 (1978) ("Evidence of absence of accidents usually involves generally unreliable negative evidence, and does not tend directly to prove absence of negligence. [N]o reports of accidents…could mean no more than no such accidents had been reported or that such accidents had previously been avoided through blind luck.")

In *Ahola v. Genesee Christian Sch*., 2009 Mich. App. LEXIS 2593 (Mich. Ct. App. Docket No. 283576, Dec. 15, 2009) (Attached as Exhibit 16), a Plaintiff missed a step and injured himself because a light was no longer working and illuminating the area where he was walking. The Court found that, **"the fact that plaintiff had negotiated these steps three hours earlier, in daylight, neither eliminates the danger posed by unlit steps at night nor negates**

the landowner's duty." *Id.* At *11. The *Ahola* Court also noted there was a question of fact as to whether the premises was reasonably maintained because a "simple remedial measure" could have prevented the injury. *Id.*

Defendants cite to unpublished cases involving *outdoor,* flat, walkways for the proposition that lack of prior incidents established that said walkways were fit for their intended purpose. These cases, however, are factually distinguishable because, here, there were multiple instances where people did actually slip on the stairs prior to the incident causing Plaintiff's injuries. Likewise, this incident occurred inside the confines of Mr. Martin's residence. The standard for the level of accessibility intended by the parties is notably different in an outdoor, flat area, as opposed to an indoor, steep stairway. Defendants' additional citation to the unpublished decision of *Carruthers* departs from the scope of the analysis in this case because its holding was based entirely on common law premises liability law, as opposed to the statutory duties of landlords which are at issue in this case.

ii. The Court of Appeals properly determined that there remain material questions of fact as to the determination of whether the stairs at issue were in reasonable repair, pursuant to MCL 554.139(1)(b).

A landlord must "repair any defects brought to his attention by the tenant or by his casual inspection of the premises." *Raatikka v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978). Defendants clearly were put on actual and constructive notice of the defects in the stairs when Plaintiff made verbal complaints of the slipperiness ***of the entire stairway*** and, again, when he put such complaints into written form. At that point, it was incumbent on Defendants to investigate and determine the cause of the slipperiness and remedy the defect. Defendants cannot show that ***any*** maintenance was ***ever*** done to the stairs at issue prior to the date of Plaintiff's injury. The steps were extremely worn and chipped which, combined with the

dangerous dimensions (short tread, high riser, etc.), created a terrible danger. The Defendants never responded to Plaintiff's concerns about the dangers that were specifically drawn to their attention by Plaintiff, even when Plaintiff suggested a simple and cost-effective remedy to the situation such as applying friction strips. The Defendants' failure to act is a clear violation of the purpose and meaning of Michigan's statute.

iii. The Court of Appeals properly determined that there remain material questions of fact as to whether the Defendant-Appellant had actual or constructive notice of the condition of the stairs.

Notice of a possible danger "may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful [invitor] to discover it." *Whitmore v Sears, Roebuck & Co*, 89 Mich. App 3, 8 (1979). An invitee is "entitled to expect" that a premises possessor will "take reasonable care to know the actual conditions of the premises and either make them safe or warn the invitee of dangerous conditions." *Kroll v Katz,* 374 Mich. 364, 373-374 (1965). "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Bank v Exxon Mobil Corp*, 477 Mich. 983, 984 (2007).

In addition, a defendant cannot claim lack of notice when defendant created the alleged hazardous condition. This has been the rule of law in Michigan for more than 40 years. Specifically, as stated by the Supreme Court in *Anderson v Merkel*, 393 Mich 603; 227 NW2d 554 (1975):

> It was not necessary for plaintiff to prove defendant had actual or constructive knowledge of the hazardous condition of its floor, as the alleged negligence was the act of defendant in creating this condition. Defendant could not by its own act create a hazardous

> condition and then demand that plaintiff, who was injured as a result thereof, prove it had knowledge of such condition. Knowledge of the alleged hazardous condition created by defendant itself is inferred.

Id. at 605.

The facts, when considered in the light most favorable to the Plaintiff, establish that Plaintiff slipped on the steps at least three times during the course of his tenancy. Plaintiff did exactly what he was required to do as a tenant. He reported the issue to the appropriate individuals. He talked to a maintenance man and told him that the steps were hazardous and that he had slipped on them. (Exhibit 2, 39-40). He also advised the resident manager, Jamie Zwicker, of the hazardous steps, as instructed by the maintenance man. *Id*. Finally, he wrote a letter on September 14, 2009, again notifying Defendants of the condition of the steps and requesting that something be done. *Id*. Both the maintenance man and Jamie Zwicker are, of course, agents of the Defendants, and notice to them is notice to Defendants. The only question to be considered by the Court is if there is a material question of fact that Defendants knew or, by the exercise of reasonable care, could have known, of the dangerous conditions of the stairs. *Grandberry-Lovette v. Garascia*, 303 Mich. App. 566 (Mich. Ct. App. 2014); *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 597 (Mich. 2000). The answer to this question is **"yes,"** they did know because Plaintiff explicitly told them on numerous occasions. Notice, both verbal and written, was clearly given to the Defendants on multiple occasions advising them that the steps were dangerous.

It is the resident manager, not the tenant, who is responsible for preparing a service request form and seeing that it is delivered to a maintenance man for the job to be completed. (See Milham Meadows Internal Protocols, attached as Exhibit 17). Furthermore, "formal notice"

is not a requirement under any statute or common law in Michigan. As such, the lack of a service request form does not mean Plaintiff failed to provide notice. In any event, it is not the responsibility of tenants to prepare service request forms. The lack of a service request form means only that the resident manager, Jamie Zwicker, failed to prepare it, something that commonly occurred when Plaintiff identified a defect in the property. (Exhibit 2, page 39; April Martin Deposition, Exhibit 18, page 38).

As far as adequacy of Plaintiff's notice, Plaintiff need only show a material question of fact exists that Defendants knew, or should have known, that the steps were dangerous. Defendants are attempting to semantically argue that complaints about the entire stairway somehow excluded the top step where Plaintiff slipped. In writing his letter to Defendants, however, Plaintiff noted that "they"—plural—were slippery. Further, in complaining to the Defendants' maintenance personnel, Plaintiff asserted that the stairway as a whole was slippery. Even if Defendants question the adequacy of their actual notice, there can be no doubt that material questions of fact remain as to their constructive notice.

Constructive notice may be found if a danger has existed a length of time sufficient that the landlord, in the exercise of reasonable care, should have discovered and remedied it. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Kroll v Katz*, 374 Mich 364, 371 (1965); *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). As correctly noted in the Court of Appeals Opinion:

> The townhouses in the Milham Meadows I development were constructed in 1972 with "cookie cutter design basement stairwells and no structural changes have been effected since. In the 38 years between construction and Martin's accident, defendants' agents inspected the premises, including the stairwell, countless times. It would be a question of fact whether defendants had constructive notice because they had or should have discovered the dangerous

> irregularity of the stairwell. *Bank v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007).

Exhibit 13, pg. 11.

Notice in *Woodbury v Bruckner*, 248 Mich. App. 684 (Mich. Ct. App. 2001), was sufficient when the Plaintiff testified he merely *thought* that he *may* have, at some unknown time during the tenancy, mentioned to the landlord that a guardrail needed to be installed. *Woodbury* at 687, n.2. Notice in *Hadden v McDermitt Apartments, LLC*, 287 Mich. App. 124, 130-131 (Mich. Ct. App. 2010), was sufficient where the tenant simply talked to the apartment manager and told him that there was snow on her steps. Neither Plaintiff in these cases filled out a formal service request form (something that Plaintiff was not even required to do, per apartment protocol). Further, the Plaintiff in *Hadden* was not precluded from pursuing her case for failing to identify the exact step she considered to be slippery when reporting their condition to her landlord. As the moving party, Defendants have the burden of establishing that it is beyond any genuine material factual dispute that they lacked actual or constructive notice of the dangerous stairs. *Grandberry-Lovette v. Garascia*, 303 Mich. App. 566, 575-576 (Mich. Ct. App. 2014). Defendants have failed to meet this burden and a jury should be permitted to decide if Defendants had notice. In fact, Defendants can never meet this burden because they created the hazardous, unfit and dangerous stairs. That inference can only be rebutted at trial.

RELIEF REQUESTED

Because Defendants cannot show that the Court of Appeals' decision was clearly erroneous, Plaintiff-Appellee respectfully requests that this Court deny Defendants-Appellants' application for leave to appeal and award costs and attorney fees incurred in responding to this matter in the Michigan Supreme Court.

Dated: October 11, 2016

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on the 11th day of October, 2016, I served the foregoing document via the TrueFiling System on the following:

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